71-1516

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. .....

IN THE MATTER OF:
RUFUS EAFIE HARRELL,
Petitioner,
versus
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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To the United States Court of Appeals for the Fifth Circuit

To the Honorables, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit dated April 21, 1972, and reported at ... F.2d .... The opinion below is appended to this Petition as Appendix A.

JURISDICTION

The date and the time of entry of the judgment sought to be reviewed was April 21, 1972. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. In a criminal prosecution, after substantial proof of inducement has been shown by a Government agent under the defense of entrapment, does the Government have the burden to prove beyond a reasonable doubt that the Defendant was not unlawfully entrapped?

2. After substantial proof of inducement has been shown by a Government agent, is the Petitioner-Defendant entitled to a charge by the trial court that the Government has the burden to prove beyond a reasonable doubt that the Defendant was ready and willing to commit the offense, and that the Defendant had the prior intent or purpose to commit the offense?

3. Did the court below err in approving the trial court's instruction to the jury, which in substance placed the burden of proof on the Petitioner-Defendant to prove the positive element of his defense of entrapment?

4. Should this Court grant certiorari to straighten out a conflict between the Circuits regarding burden of proof requirements in cases where entrapment is a defense?

5. In federal criminal cases, is the prosecution entitled to a lesser burden of proof requirement where entrapment is a defense than in cases where self-defense or insanity are defenses?

6. In federal criminal cases, does a defendant have a greater burden to establish a defense of entrapment than he would to establish a defense of insanity or self-defense?

CONSTITUTIONAL AND STATUTORY PROVISIONS

There are no Constitutional or statutory provisions involved in this case.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari is sought to review, under 28 U.S.C., § 1254(1), the judgment and opinion of the Court of Appeals for the Fifth Circuit entered on April 12, 1972 (Appendix A).

Petitioner is Rufus Eafie Harrell (hereinafter referred to as "Harrell"), a farmer who lives near Opp, Alabama, a farming community in South Alabama. Harrell was indicted together with one Durwood Norris (hereinafter called "Norris") for alleged violations of the Internal Revenue laws with respect to liquor. The original indictment contained five counts; one count was nol-prossed; and Harrell was tried on three counts charging him with possessing or selling untax-paid liquor and one conspiracy count. Prior to the trial Norris pled guilty but made it explicitly that his guilty plea did not implicate Harrell and that Harrell was not a part of the liquor conspiracy. Harrell's primary defense was not guilty by reason of entrapment. Harrell was acquitted as to the three substantive counts but found guilty on the conspiracy count.

(a) The Pertinent Facts on Inducement

The Government's case consisted primarily of the testimony of an undercover agent, William K. Sams. The agent testified that:

> "I was to represent myself as being in the illicit whiskey business as a transporter or wholesaler. I was to represent myself as living in Enterprise, Alabama. We (a group of agents) discussed the fact that my market would be and around Enterprise and Fort Rucker, where I would be selling the illicit whiskey."

Sams was also instructed and informed that one Tobe Adams, a resident of Opp, Alabama, who "had a reputation for being in the whiskey business" was "set up to verify [Sams'] story to Mr. Harrell."

The plan devised by the agents was for Sams to go and visit with Harrell, to befriend him, and gain Harrell's sympathy through a fictitious story of a deserting wife and small dependent children, and to tell Harrell that he (Sams) had been buying whiskey from Tobe Adams, that Adams was out of whiskey and had sent Sams to and recommended him to Harrell. Thereafter, Adams would call Harrell and vouch for Sams and Sams' personal predicaments. Sams was advised that a State agent "had contacted Tobe Adams and had given a description of [Sams] to Adams and that Tobe was ready to try to set up Harrell."

Sams was given directions to Harrell's home by other agents and arrived in the afternoon of September 5, 1968. Harrell was at his barn. Sams drove up in a 1966 Volkswagen auto, with a Pensacola tag, and introduced himself as "Billy Sanders," asking whether Mr. Harrell was "Boy Harrell."

They had a "general conversation" about the "weather", etc., which lasted about 30 to 45 minutes. During this conversation Sams admitted that—

—he drank two beers "to strengthen his undercover capacity."

—His appearance was disguised; he had long hair.

—He told Harrell that he was from Pensacola, Florida, and that he "had a wife and two children, that his wife had left him, and that his two children were in Enterprise, Alabama, with his mother."

—He was "in the whiskey business" and "continued elaborating on that point."

—He "had been doing business with [Tobe Adams] in that county, and that [Tobe] temporarily had no whiskey available for me and suggested or recommended that I go to Boy Harrell."

—He was a "wholesaler of considerable magnitude, fifty or a hundred gallons a week."

After all of this, Sams admitted on direct that:

Q. All right, sir. Now, did you ask him if he had any whiskey?

A. I—to the best of my recollection, I did; yes, sir.

Q. All right, sir; what was his response, if any?

A. He denied that he did at that time.

Q. Have whiskey?

A. That he did not have whiskey.

And on cross-examination, Sams admitted:

Q. Mr. Sams, I believe you testified on direct examination that at first, on your first visit to Mr. Harrell on September 5, that he denied having any whiskey; is that correct?

A. Yes, sir; that is correct.

Q. He denied knowing where any whiskey was; this was the first visit; is that correct, sir?

A. I don't recall the depth of our conversation, but he said he had no whiskey at that time.

Q. Did he say in substance he didn't know where you could find any?

A. At that time, he did; yes, sir.

Sams further testified that Harrell then told him that "if I could get Tobe Adams to call him by telephone and give me a recommendation, to state that he was doing business with me, that he might be able to help me."

Sams then left Harrell's home and went by Tobe Adams' house, evidently for Adams to be able to describe Sams and his car to Harrell, and Sams stated that he supposed Adams had called Harrell.

Several hours later, Sams returned to Harrell's home and after Sams had been "vouched for" by Tobe Adams, Harrell took Sams to the home of the co-defendant, Durwood Norris, some six miles away, where a sale of 50 gallons was transacted.

The above summary of the evidence proves, conclusively, that substantial evidence was presented during the Government's case-in-chief to establish "inducement" on the part of the Government.

(b) **The Instruction on Entrapment**

The case has been tried twice. The Fifth Circuit reversed the judgment in the first trial in an opinion reported as **United States v. Harrell**, 437 F.2d 606 (5 Cir. 1970). This prior opinion is set out as Appendix B to this petition. In the first appeal to the Fifth Circuit, error was charged in the trial court's instruction to the jury on the law of entrapment. The Fifth Circuit held (Appendix B, pp. 11-12):

> "A related question arises because of the court's failure to instruct the jury as to the government's burden of proof beyond a reasonable doubt as to no entrapment, once the defendant has come forward with some evidence of inducement. Although apparently never specifically adopted by this Circuit, this is the accepted rule.[6] We would follow Notaro, and reverse

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[6] See Notaro v. United States, 9 Cir. 1966, 363 F.2d 169, where there are set forth the procedural guidelines to be followed once the entrapment issue is raised, and also the following cases: Sagansky v. United States, 1 Cir. 1966, 358 F.2d 195; Johnson v. United States, D.C. Cir. 1963, 317 F.2d 127; United States v. Landry, 7 Cir. 1958, 257 F.2d 425; Lunsford v. United States, 10 Cir. 1952, 200 F.2d 237."

for the trial court's error in this respect, if objection had been timely made to the charge, as required by Rule 30, F.R.Crim.P. See also Kivette v. United States, 5 Cir. 1956, 230 F.2d 749, cert. denied 355 U.S. 935, 78 S.Ct. 419, 2 L.Ed.2d 419; United States v. Sherman, 2 Cir. 1952, 200 F.2d 800, 882, 883. But the dereliction was not brought to the trial court's attention, and since the case must be reversed on other grounds, we pretermit discussion of whether 'plain error' is thus presented, under Rule 52(a), F.R. Crim.P. Of course, upon retrial, the trial judge should follow Notaro standards in his jury instructions if entrapment is again offered as a defense.

In the second trial, the trial court charged the jury (Appendix A, pp. 3-5):

"You have heard considerable discussion in this case on entrapment. Entrapment is a part of the defense in this case. I want to charge you on the law of entrapment. The burden of proof in this case is on the Government as to each count. The burden of proof is on the United States as to each element in each count. The burden of proof in this case is on the Government to prove that there was no unlawful or illegal entrapment, and to do that, as they are required to do other things, to do it with the evidence beyond a reasonable doubt.

"Now, in this case, Harrell offers as a defense that he was unlawfully entrapped. Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he's entitled to the defense of entrapment; because the law as a matter of policy, forbids conviction in cases like that. On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that Government agents provide what appears to be a favorable op-

portunity is no defense. When, for example, the Government has reasonable grounds for believing that a person is engaged in the illicit whiskey business, it's not unlawful for the Government agent to pretend to be someone else and to offer, either directly or through an informer, to purchase illegal whiskey from such suspected person.

"If, then, you jurors should find from the evidence that, before anything at all occurred respecting the offenses involved here, Harrell was ready and willing to commit crimes such as those charged in this indictment whenever the opportunity presented itself, and the Government merely offered him the opportunity, then Harrell is not entitled to the defense of entrapment.

"If, on the other hand, you jurors should find that Harrell had no previous intent or purpose to commit any offense as charged in this indictment, and did so only because he was induced or persuaded by some agent of the Government; then the prosecution, the law says, has seduced an innocent person, and the defense of entrapment is a good defense and the defendant should be acquitted."

The last two paragraphs of this charge are practically verbatim from the trial court's charge in the first trial which was condemned in the first appeal. The last two paragraphs of this charge are also **practically verbatim** from the instruction condemned by the Ninth Circuit in **Notaro v. United States**, 363 F.2d 169, 173 (9 Cir. 1966). In **Notaro**, the trial court charged (363 F.2d at 173):

"If, then, the jury should find **beyond a reasonable doubt** from the evidence in the case that before anything at all occurred respecting the alleged offense involved in this case, the accused was ready and willing to commit crimes such as charged in the in-

dictment, whenever opportunity was offered and that the Government agents did no more than offer the opportunity, the accused is not entitled to the defense of unlawful entrapment.

"**On the other hand, if the jury should find from the evidence in the case that the accused had no previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government, then the defense of unlawful entrapment is a good defense and a jury should acquit the defendant.**" (Emphasis added by the Court.)

Note, the words "beyond a reasonable doubt" in the first paragraph of the **Notaro** charge were not even included in that portion of the **Harrell** charge.

The instruction given in this case was excepted to and counsel for Harrell specifically asked the trial court to give previously requested instructions on the burden of proof requirements. The trial court refused this request (Appendix A, pp. 5-6). These requested instructions are attached as Appendix C.

In the Opinion below, a divided court held that no confusion or prejudicial error resulted from this charge. In a dissenting opinion, Judge Thornberry could find no distinction between the instruction given below and the condemned instruction in **Notaro**. He held (Appendix A, p. 12):

"In both cases [instant case and **Notaro**] the first part of the charge properly conveys advice to the effect that appellant was not entitled to the defense of entrapment if the jury should find beyond a reasonable doubt that he was ready and willing to commit the offense and that the government agents did no more than provide the opportunity. In both cases, however, the

second part of the charge, pointing directly to the elements of the defense and using the emphasized language, likely created the impression in lay minds that appellant carried the burden on the positive elements of his defense. I thus see no distinction between **Notaro** and the instant case."

Therefore, we find an instruction on the law of entrapment which has been condemned as prejudicially erroneous in one Circuit and approved in another.

ARGUMENT

"Entrapment" occurs, under the rule in **Sorrells v. United States**, 287 U.S. 435 (1932), "when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute" (287 U.S. at 442). Hence, under the **Sorrells** rationale, once defendant shows "inducement" by **some evidence**, the Government should have the burden of proving beyond a reasonable doubt that (1) defendant was ready and willing to commit the offense and (2) that defendant had the prior intent or purpose to commit the offense. That is, the prosecution should have the usual and traditional burden of proof requirements which it shoulders in rebutting other defenses in criminal cases which have been reasonably established by the evidence.[1]

Since Judge Learned Hand's opinion in **United States v. Sherman**, 200 F.2d 880 (2 Cir. 1952), most of the Circuits have interpreted **Sorrells v. United States**, 287 U.S. 435, as requiring the answer to two questions of fact in an entrapment defense, viz: "(1) did the agent induce defendant to commit the offense; (2) if so, was defendant ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense." The Court held that on the first question the defendant has the burden, and on the second, the Government has it. However, the opinion in **Sherman** was silent as to what "degree" of proof was necessary for each side.

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[1] These burden of proof requirements are found in self-defense cases, see **DeGroot v. United States**, 78 F.2d 244 (9 Cir. 1935); **Frank v. United States**, 42 F.2d 623 (9 Cir. 1930); and in the insanity defense, see **Naples v. United States**, 344 F.2d 508 (D.C. Cir. 1964); **Rivers v. United States**, 270 F.2d 435 (9 Cir. 1959).

Initially, some courts held as in **Gorin v. United States**, 313 F.2d 641 (1 Cir. 1962), that "the defendant has the burden of proving by a preponderance of the evidence that he was induced and if he meets that burden, the prosecution must then prove, beyond a reasonable doubt, that defendant was predisposed to commit the offense." Most of the Circuits, however, lessened the burden of defendant from that of "persuasion" to that of "some evidence." For example, the First Circuit in **Sagansky v. United States**, 358 F.2d 195 (1 Cir. 1966) modified **Gorin v. United States**, *supra*, and reduced "the burden which we have previously placed on the defendant from a burden of persuasion to a mere burden of coming forward with evidence" (358 F.2d at 303). Therefore, should the evidence support a finding of inducement, the defendant is entitled to a charge "that the Government has the burden of proving beyond a reasonable doubt that there was in fact no inducement or that the defendant was predisposed."

The Ninth Circuit in **Notaro v. United States**, 363 F.2d 169 (1966), adopted a similar view, holding (363 F.2d at 175):

> "The duty of determining whether or not the issue exists is the judge's duty, not the jury's, and if the issue exists and the determination of the ultimate question of entrapment is submitted to the jury, 'it is better [that the instructions not "speak in terms of the defendant having [any burden whatsoever].' Johnson v. United States, 115 U.S. App. D.C. 63, 317 F.2d 127, 129 (1963). The issue having appeared, it becomes the prosecution's burden to establish beyond a reasonable doubt that the accused was not entrapped into the commission of the offense."

See also **Johnson v. United States**, 317 F.2d 127 (D.C. Cir. 1963).

While the Fifth Circuit apparently adopted the burden of proof standards of **Notaro, Sagansky** and **Johnson** in the first **Harrell** Opinion, it effectively took them away in the Opinion below when it approved the same charged condemned in **Notaro.**

Clearly, the trial court's charge approved by the majority of the Court below, is prejudicially erroneous to this defendant and adds confusion and ambiguity to the statement of law on entrapment defenses in the following particulars:

1. The charge fails to charge that inducement was established as a matter of law.

2. The charge not only failed to state that Harrell was entitled to the defense of entrapment as a matter of law, but instructed the jury that he might not be "entitled to the defense of entrapment."

3. The charge fails to instruct that inducement was supported by the evidence,[2] and that the Government has the burden of proving beyond a reasonable doubt that defendant was ready, willing and able to commit the offense or was predisposed to commit the alleged crime.

4. The language of the charge clearly states and creates the impression that defendant had the burden of proving that before the Government's inducement, defendant had no intent or purpose to commit the offenses.

5. The charge fails to instruct the jury that after the evidence had established that the offense charged

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[2] The Government, we submit, cannot contest that inducement and therefore the issue of entrapment was supported by the evidence under **Notaro, Sagansky,** et al.

was attended by the inducement by or intervention of a government agent, the burden of proof rests on the Government to establish beyond a reasonable doubt that the defendant was not entrapped into committing the offense.

6. The charge clearly gave the impression to the jury that "cloak and dagger" tactics such as employed by Agent Sams were good, approved law-enforcement techniques.

The trial court's charge was a complete misstatement of the law of entrapment as applied to this case—it reversed the "burden of proof" requirements; it imposed on defendant a greater "burden" than required by other Circuits under the authorities, *supra*; and it failed to charge as to the undisputed proof of inducement.

In summary, the Fifth Circuit has effectively adopted standards in cases involving entrapment defenses which are diametrically opposed to the holdings in the First, Ninth and D.C. Circuits.

The Fifth Circuit has held that even where inducement is shown by the Government in its case-in-chief, the defendant has the burden of establishing the defense of entrapment, where the law in the other Circuits is clear that the prosecution has the burden to prove beyond a reasonable doubt that no entrapment existed.

CONCLUSION

We respectfully submit that certiorari should be granted in this case, and urge that the Supreme Court issue the appropriate guidelines where entrapment is a defense so that uniformity may be had. We urge that certiorari be granted so that Petitioner will be given his full defense under proper burden of proof requirements.

Respectfully submitted

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Certificate of Service

I hereby certify that I have served three copies of the foregoing upon Honorable Ira DeMent, United States Attorney, Middle District of Alabama, Postoffice Building, Montgomery, Alabama, by mailing such copies, postage prepaid, on this the 18th day of May, 1972.

Euel A. Screws, Jr.
Attorney for Petitioner

APPENDIX A

In the
United States Court of Appeals
For the Fifth Circuit

No. 71-2357

United States of America,
Plaintiff-Appellee,

versus

Rufus Eafie Harrell,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Alabama

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(April 21, 1972)

Before Thornberry, Coleman and Ingraham, Circuit Judges.

Coleman, Circuit Judge: This case comes as a reminder that while the *law* of entrapment is relatively plain its application to any particular case often remains clouded and confused.

This is the second appearance of this case in this Court. Our former decision is reported, *United States v. Harrell*, 5 Cir., 1970, 436 F.2d 606 [Judges Simpson, Morgan, and Ingraham].

On the former appeal, Rufus Eafie Harrell, the appellant, had been convicted of conspiracy to violate the Internal Revenue Laws, sale of non-tax paid spirits [2 counts], and possession of 200 gallons of such contraband. He was sentenced to imprisonment for thirty months. The conviction was reversed for the admission of inadmissible hearsay evidence.

The evidence surrounding the alleged offenses is fully reported in our former decision, 436 F.2d 609-611.

When the case came on for a second trial, after being reversed and remanded, Mr. Harrell was convicted only of conspiracy to violate the Internal Revenue Laws with reference to non-tax paid whiskey, 18 U.S.C., § 371. He was sentenced to serve thirty months in the custody of the Attorney General. He was acquitted of the three other counts which charged sale and possession.

On the present appeal, we affirm the judgment of the District Court.

Stripped to their essentials, the contentions presently raised are that Harrell was entitled to a judgment of acquittal because he was entrapped as a matter of law, or, in any event, the jury charge on entrapment was fatally defective.

We are of the opinion that the question of a directed acquittal (entrapment as a matter of law) was settled, as the law of the case, on the former appeal. On facts not materially dissimilar to those adduced at the trial now under review, this Court held:

> "We are of the view, however, that the question of entrapment in this case was properly for decision by the jury as a factual matter, not by the trial judge as a matter of law. Goss v. United States, 5 Cir., 1967, 376 F.2d 812; Cline v. United States, 8 Cir.,

1920, 20 F.2d 494. As stated in *Goss*, supra: 'The issue of entrapment is a question for the jury unless as a matter of law the defendant has established beyond a reasonable doubt that he was unlawfully entrapped.' Here, it is apparent that the evidence was susceptible of more than one interpretation."

This leaves only the question of whether the jury instructions on entrapment were erroneous. We briefly discussed jury instructions in the former opinion, 436 F.2d 612, and stated that the conviction would have been reversed for error in the instructions if there had been timely objection in the trial court. We went ahead to say that once the defendant has come forward with some evidence of inducement then the jury must be instructed that it is the government's burden to prove entrapment beyond a reasonable doubt. Attention was directed [footnote 6, 436 F.2d 612] to *Notaro v. United States*, 9 Cir., 1966, 363 F.2d 169, and four other decisions, dealing with the procedural guidelines to be followed once the entrapment issue is raised.

On the trial now under review the District Court charged the jury, as to the burden of proof on entrapment, as follows:

> "You have heard considerable discussion in this case on entrapment. Entrapment is a part of the defense in this case. I want to charge you on the law of entrapment. The burden of proof in this case is on the Government as to each count. The burden of proof is on the United States as to each element in each count. *The burden of proof in this case is on the Government to prove that there was no unlawful or illegal entrapment, and to do that, as they are required to do other things, to do it with the evidence beyond a reasonable doubt.* (Emphasis added) Now, in this case, Harrell offers as a defense that he was

unlawfully entrapped. Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he's entitled to the defense of entrapment; because the law as a matter of policy, forbids conviction in cases like that. On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is no defense. When, for example, the Government has reasonable grounds for believing that a person is engaged in the illicit whiskey business, it's not unlawful for the Government agent to pretend to be someone else and to offer, either directly or through an informer, to purchase illegal whiskey from such suspected person. If, then, you jurors should find from the evidence that, before anything at all occurred respecting the offenses involved here, Harrell was ready and willing to commit crimes such as those charged in this indictment whenever the opportunity presented itself, and the Government merely offered him the opportunity, then Harrell is not entitled to the defense of entrapment. If, on the other hand, you jurors should find that Harrell had no previous intent or purpose to commit any offense as charged in this indictment, and did so only because he was induced or persuaded by some agent of the Government; then the prosecution, the law says, has seduced an innocent person, and the defense of entrapment is a good defense and the defendant should be acquitted."

Before the District Judge instructed the jury [R. 168-169], in a colloquy with defense counsel, he stated, "I will charge that the evidence must convince beyond reasonable doubt of the guilt, including this business that there was no entrapment. * * * I will charge that a prior criminal record does not disqualify an accused from

defending on the ground of entrapment, and then the burden is on the Government to satisfy that there was no entrapment, as I will define that to them".

Upon completion of the charge [R. 186-187], when exceptions or objections were called for, the following took place:

> "Mr. Screws: [Counsel for Harrell] Judge, I was going to ask the Court to charge the jury on the burden of proof requirements of entrapment, to prove beyond a reasonable doubt that he was not unlawfully entrapped; and specifically, I refer to charges thirteen, fifteen, sixteen, and seventeen.
>
> "The Court: Didn't I charge them that the burden was on the Government to prove that Rufus E. Harrell was not unlawfully entrapped?
>
> "Mr. Screws: I don't believe you charged them that the burden was to prove beyond a reasonable doubt.
>
> "The Court: I think I did. I will stand on it. I— I recall doing it; I will stand on the record on it."

In *Notaro* the Ninth Circuit approved, as correct, this (first) part of the jury instructions:

> "If, then, the jury should find beyond a reasonable doubt from the evidence in the case that before anything at all occurred respecting the alleged offense involved in this case, the accused was ready and willing to commit crimes such as charged in the indictment, whenever opportunity was offered and that the Government agents did no more than offer the opportunity, the accused is not entitled to the defense of unlawful entrapment."

It disapproved this (second) part of the instruction:

> "On the other hand, if the jury should find from the evidence in the case that the accused had no pre-

vious intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government, then the defense of unlawful entrapment is a good defense and a jury should acquit the defendant."

It held that the second portion of the instruction, to avoid confusion on the part of the jury, should have included the following language:

"In this regard, if the jury should have any reasonable doubt from the evidence in the case as to whether the defendant was the victim of an unlawful entrapment, the jury should acquit the accused."

In the case now before us, the following language in the entrapment instruction is undoubtedly clear and is of such clarity that no qualified juror could be expected to misunderstand it:

"You have heard considerable discussion in this case on entrapment. Entrapment is a part of the defense in this case. I want to charge you on the law of entrapment. The burden of proof in this case is on the Government as to each count. The burden is on the United States as to each element in each count. The Burden of proof in this case is on the Government to prove that there was no unlawful or illegal entrapment, and to do that as they are required to do other things, to do it with the evidence beyond a reasonable doubt. Now, in this case, Harrell offers as a defense that he was unlawfully entrapped. Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he's entitled to the defense of entrapment; because the law, as a matter of policy, forbids conviction in cases like that. On

the other hand, where a person already has the readiness and willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is no defense. When, for example, the Government has reasonable grounds for believing that a person is engaged in the illicit whiskey business, it's not unlawful for the Government agent to pretend to be someone else and to offer, either directly or through an informer, to purchase illegal whiskey from such suspected person."

The determinative issue then narrows to whether the remainder of the instruction, as first hereinabove set forth, could reasonably have confused the jury as to the burden required of the prosecution.

Upon careful consideration we are persuaded that the correct answer is in the negative.

The closing portion of the instruction was a correct statement of the law of entrapment, that is, (1) if Harrell was ready and willing to commit the offense charged whenever the opportunity presented itself and the government merely offered him the opportunity, then there was no entrapment; (2) if there was no prior intent or purpose to commit the offense charged and it was done only because the defendant was induced or persuaded by some agent of the government then entrapment is a good defense.

There is nothing said in this part of the instruction as to the burden of proof on anybody. At the very beginning of the instruction the jury was clearly informed that the burden of proof was on the prosecution to prove by the evidence beyond a reasonable doubt that there had been no unlawful or illegal entrapment.

We know of no reason to hold that the jury had to be told more than once that the burden was (and is) as there set forth.

The oral arguments to the jury are not in the record, but the record does show that before charging the jury the District Judge told counsel for the defense that he would inform the panel that the government would have to prove the absence of entrapment beyond a reasonable doubt. He, in fact, did so charge.

We are thus of the view that there was no reversible error below and no justification for remanding this case for a third trial.

The judgment of the District Court is

Affirmed

Thornberry, Circuit Judge, Dissenting: I regret that I am unable to concur.

Under the principles enunciated in *Notaro v. United States,* 9 Cir., 1966, 363 F.2d 169, approved by this Court in *United States v. Harrell,* 5th Cir. 1970, 436 F.2d 606, 612 n.6, I would reverse appellant's conviction in the instant case.

In *Notaro,* the following charge on entrapment was rejected:

> If, then, the jury should find beyond a reasonable doubt from the evidence in the case that before anything at all occurred respecting the alleged offense involved in this case, the accused was ready and willing to commit crimes such as charged in the indictment, whenever opportunity was offered and that the Government agents did no more than offer the opportunity, the accused is not entitled to the defense of unlawful entrapment.
>
> On the other hand, if the jury should find from the evidence in the case that the accused had no

previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government, then the defense of unlawful entrapment is a good defense and a jury should acquit the defendant.

363 F.2d at 173.

The trial court in the instant case charged:

The burden of proof in this case is on the Government to prove that there was no unlawful or illegal entrapment, and to do that, as they are required to do other things, to do it with the evidence beyond a reasonable doubt. Now, in this case, Harrell offers as a defense that he was unlawfully entrapped. Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he's entitled to the defense of entrapment; because the law, as a matter of policy, forbids conviction in cases like that. On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is no defense . . . *If, then, you jurors should find from the evidence that,* before anything at all occurred respecting the offenses involved here, Harrell was ready and willing to commit crimes such as those charged in this indictment whenever the opportunity presented itself, and the Government merely offered him the opportunity, then Harrell is not entitled to the defense of entrapment. *If, on the other hand, you jurors should find that* Harrell had no previous intent or purpose to commit any offense as charged in this indictment, and did so only because he was induced or persuaded by some agent of the Government; then the prosecution, the law says,

has secured an innocent person, and the defense of entrapment is a good defense and the defendant should be acquitted. (Emphasis added.)

In both cases, the first part of the charge properly conveys advice to the effect that appellant was not entitled to the defense of entrapment if the jury should find beyond a reasonable doubt that he was ready and willing to commit the offense and that the government agents did no more than provide the opportunity. In both cases, however, the second part of the charge, pointing directly to the elements of the defense and using the emphasized language, likely created the impression in lay minds that appellant carried the burden on the positive elements of his defense. I thus see no distinction between *Notaro* and the instant case.

The majority quotes language of the trial court indicating his intent to make clear that the reasonable doubt standard was to be applied to the entrapment defense. I have no doubt that the trial court made a conscientious effort to follow the mandate of this Court in the previous appeal of this case. His failure to do so, however, makes any intent on his part irrelevant and necessitates a reversal here.

I respectfully dissent.

APPENDIX B

In the
United States Court of Appeals
for the Fifth Circuit

No. 28126

United States of America
Plaintiff-Appellee

versus

Rufus Eafie Harrell
Defendant-Appellant

Appeal from the United States District Court for the Middle District of Alabama

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(December 22, 1970)

Before Simpson, Morgan and Ingraham, Circuit Judges.

Simpson, Circuit Judge: Appellant, Rufus Eafie Harrell, and a co-defendant Durwood Norris were indicted together on five counts alleging violation of the Internal Revenue Laws pertaining to non-tax paid distilled spirits. Prior to Harrell's trial, Durwood Norris pled guilty to all counts except Count Five which was dismissed. That count charged Norris alone with possession of an unregistered distillery on September 21, 1968. Harrell went to trial on his plea of not guilty to the remaining four

counts of the indictment. Count One charged Harrell and Durwood Norris with entering into a conspiracy to violate the revenue laws between September 5, 1968 and September 22, 1968. Durwood Norris' son, Thomas Richard Norris, was named as a co-conspirator but not as a co-defendant. Counts Two and Three charged Harrell and Durwood Norris with sales of non-tax paid spirits: 50 gallons on September 5, 1968, and 50 gallons on September 6, 1968, in violation of Chapter 51, Title 26, U. S. Code. Count Four charged the two defendants with possession of 200 gallons of non-tax paid spirits on September 21, 1968, also in violation of Chapter 51, Title 26, U. S. Code. The particular section involved under all three counts is Title 26, U.S.C., Section 5604. The substantive offenses charged by Counts Two, Three and Four or evidentiary portions of them were the basis for the six overt acts laid in the conspiracy count, Count One.[1]

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[1] The overt acts alleged under Count One were:

"Overt Acts

1. On or about September 5, 1968, at, to-wit 8:30 P. M., Rufus Eafie Harrell and Durwood D. Norris engaged in a conversation at or near the residence of Durwood D. Norris situated in Covington County, Alabama, approximately 9½ miles southwest of Opp, Alabama.

2. On or about September 5, 1968, at, to-wit, 9:20 P.M., and at a point, to-wit, one mile north of Enon Church in Covington County, Alabama, Rufus Eafie Harrell, Durwood D. Norris and Thomas Richard Norris loaded 50 one-gallon glass jugs containing 50 gallons of non-tax paid distilled spirits into an automobile.

3. On or about September 5, 1968, at, to-wit 9:40 P. M. and at a point, to-wit, one mile north of Enon Church in Covington County, Alabama, Rufus Eafie Harrell Received $250.00 in payment for 50 gallons of non-taxpaid distilled spirits.

4. On or about September 6, 1968, at, to-wit, 8:35 P. M. and at a point, to-wit, 300 yards from his residence in Covington County, Alabama, Durwood D. Norris loaded 50 gallons of non-taxpaid distilled spirits contained in 50 one-gallon jugs into an automobile.

5. On or about September 6, 1968, at, to-wit, 9:00 P.M. and at a point, to-wit, 300 yards from his residence in Cov-

Harrell was found guilty by the jury as to each of the four counts on trial and received a general sentence to thirty months custodial confinement. This appeal timely followed. We reverse on the basis of what we conceive to be demonstrated prejudicial error infecting Harrell's conviction as to each count.

I. *The Evidence*

We set out below portions of the prosecution's evidence, stated in the light most favorable to the government's case, *Glasser v. United States*, 1942, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680, and extracted largely from the testimony of the government's witnesses. We also refer to additional evidence which bears upon the grounds of error asserted. The key government witness was William Sams, a special investigator with the Alcohol, Tobacco and Firearms Division of the U. S. Treasury Department, whose function in this case was that of an undercover agent. Sams related that on the afternoon of September 5, 1968, he drove to the appellant's farm residence posing as an illicit whiskey dealer, and after leisurely, friendly conversation gained Harrell's confidence. He inquired of Harrell as to the possibility of purchasing moonshine. Harrell indicated that he knew where a supply was available at $5.00 per gallon and at Sams' request accompanied Sams to the Norris farm, several miles away where the first 50 gallon purchase (charged in Count One) took place. The location was about

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ington County, Alabama, Durwood D. Norris received $237.50 in payment for 50 gallons of non-taxpaid distilled spirits.

6. On or about September 21, 1968, at, to-wit, 8:30 P.M., Durwood D. Norris directed William K. Sams to a stash of non-taxpaid distilled spirits, which was situated at, to-wit, 300 yards from the residence of Durwood D. Norris in Covington County, Alabama, and which stash contained, to-wit, 200 gallons of non-taxpaid distilled spirits."

9½ miles southwest of Opp, Alabama. Harrell and Norris conferred outside Sams' hearing and Harrell returned to Sams' car and directed the agent to drive to a location about 250 yards from the Norris residence. Norris and his son joined them at this point, driving a 1960 Chevrolet station wagon, which contained 50 one-gallon jugs of non-tax paid moonshine whiskey. The whiskey was off-loaded to the ground by the two Norrises, Harrell and Sams. Sams asked Harrell about securing some paper bags to place around the jugs, whereupon Harrell and the older Norris left and returned with several fertilizer bags to wrap around the jugs. The sale was then completed and the jugs loaded into the undercover agent's vehicle. The agreed price of $5.00 per gallon was paid by Sams to Harrell, who placed the money in his pocket. Harrell asked Sams if he would need more whiskey and Sams replied that he would need another 50 gallons the following night. Harrell instructed Sams not to come by his house on that occasion but to go directly to Norris' house and that Norris would take care of him. Sams then drove to a pre-arranged meeting with other agents who assisted in the destruction of the 50 gallons of non-tax paid whiskey.

On September 6 Sams returned to Norris' house as instructed by Harrell. He was joined by Norris, who directed him to a non-tax paid whiskey "stash" (caché) where 50 gallons of whiskey were loaded into the Sams' vehicle, Sams paying Norris therefor. On this occasion price was discussed and a bargain was struck for Sams to purchase 200 gallons at the reduced price of $4.50 per gallon. Norris told Sams to call Harrell on "Tuesday a week" (September 17) to see whether the 200 gallons of whiskey were available. Sams dropped Norris at his residence and again drove the vehicle to a pre-arranged location where he and other agents destroyed the recently purchased whiskey.

On September 20 Sams placed a person-to-person call to Harrell's residence, spoke with Harrell and was told that the 200 gallons of whiskey would be ready on the following night. On September 21, with ATFD Agent Williams, Alabama ABC[2] Agent Catrett, and Chief Deputy Sheriff Berry of Covington County concealed in the trunk of his automobile, Sams drove to Harrell's residence. Harrell informed Sams that he was going to town with his wife and that Sams should go directly to Norris' home where the whiskey was available. He arrived at Norris' residence and was joined in the car by Norris and directed to a location in the close vicinity of the two previous purchases, where he saw a "stash" of numerous one-gallon jugs, later counted to be 200, and later found to contain non-tax paid whiskey. Norris was arrested and advised of his constitutional rights, and the four officers proceeded to destroy the whiskey on the spot. Later that night or in the early morning hours of September 22 the appellant Harrell was arrested at his own home.

Sams was permitted to testify at trial over the defendant's objection that on the night of the arrest the agents discovered a complete illicit distillery, set-up, a number of drums of fermenting mash, and 35 gallons of non-tax paid whiskey, at a point about 300 yards from the place of Norris' arrest. Neither possession of the distillery nor the manufacture of distilled spirits was charged as an object of the conspiracy, those objects being described as the removal, concealment, possession, transportation, sale and transfer of non-tax paid whiskey with intent to defraud the United States. No overt act charged in Count One dealt with the possession of a

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[2] Alcohol Beverage Control Board, the Alabama statutory authority charged with the regulation of the manufacture and sale of alcoholic beverages. Code of Alabama Recompiled 1958, Title 29, Sections 1-78.

distillery or the fermenting mash,[3] and as already related above neither substantive count for which Harrell was on trial was concerned with the possession of a distillery or the fermenting or possession of mash.[4]

During the trial, and again over defense objection, Agent Williams testified that after the arrest of Norris and the discovery of the still Norris made a statement to him on the way to jail. We quote Williams' testimony in this respect:

> "Norris stated that the still belonged to him; he said it had been there about three or four months and that he had put it there to help pay off the farm".

There was testimony at the trial relating to a prior "feud" or vendetta between Harrell and Alabama ABC Agent Catrett, one of the officers participating in the arrest. Both sides eventually offered testimony as to this feud, although it was first gone into over defense objection by the government's trial attorney in his cross-examination of the appellant Harrell. This incident—which occurred several weeks prior to the conspiracy dates—involved the exchange of heated words and purported threats of bodily injury to Catrett because of the agent's presence in and near Harrell's watermelon field, without permission, apparently searching for evidence of moonshine activity. Catrett on cross-examination by defense counsel denied any right to direct Sams to undertake undercover activities, but did admit that he suggested that they be carried out.

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[3] See footnote 1 above.

[4] As noted earlier Count Five had charged Norris with possession of an unregistered distillery on September 21, but this count did not involve Harrell and had already been dismissed as to Norris. Additionally Norris was not then on trial, having previously pled guilty.

The appellant offered testimony of three witnesses as to his good reputation generally in the community and also as to his good reputation for truth and veracity. The government attorney on cross-examination questioned these defense character witnesses as to Harrell's general reputation for being in the whiskey business "prior to this indictment". All had heard of a prior whiskey conviction, but one witness pointed out that this had no bearing on a reputation for being truthful. No objection was offered to this cross-examination. The defense rested at this point and the government recalled Federal Alcohol Tax Agent Williams for rebuttal testimony. Williams was questioned as to his knowledge of Harrell's "general reputation in the community for being in the illicit whiskey business, prior to this indictment". The witness answered "Yes sir", and defense counsel immediately objected. The trial judge excused the jury and sustained the objection but denied a motion for mistrial and refused to instruct the jury to disregard the question saying "Well, I am not going to try and eradicate it, other than to tell the jury that what the lawyers say is not evidence, I don't see that it is highly prejudicial. He's testified he has been in the whiskey business".[5] There the matter rested except that the jury was so instructed as a part of the general charge.

Norris' guilty plea was entered March 26, 1969, several months prior to Harrell's trial commencing June 5, 1969. Norris and his counsel sought then to make it clear to the court and to counsel for the government that he was pleading guilty to each count "except to the still", but that as to Count One he was not pleading guilty to conspiring with Harrell, or with his son, Thomas Norris. His counsel stated unequivocally that

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[5] On cross-examination, Harrell had admitted a prior state whiskey conviction.

he intended to plead guilty only to conspiring with the "distilling fellows" or with the "other persons to the Grand Jury unknown" alleged by the indictment to be members of the conspiracy. The court pointed out that Norris was either guilty or not guilty as to Count One, and that if he pled guilty it would have to be "as charged." It was then stated and apparently understood by court and opposing counsel that the other persons identified in the indictment by name (Harrell and the younger Norris) were not parties to any such conspiracy to Norris' knowledge.

During the trial Norris took the stand in Harrell's defense, stating that he sold the whiskey to Sams (known to him as Billy Sanders), after Harrell introduced him, that he had no knowledge of the still, which although nearby was not on his land, and that he had purchased all the whiskey sold to Sanders from a man at the still known to him as William Jones. Norris was unequivocal in asserting that when Sanders tried to pay Harrell on the occasion of the first sale Harrell refused the money and Sanders gave it to him (Norris). On cross he admitted pleading guilty to all counts of the indictment ". . . except the still; I didn't accept the still". He could not remember whether he admitted to one of the officers on the night of his arrest that he owned the still: "I might have told them a lot of things—that I was all shook up".

In his own defense Harrell also denied connection with the actual transactions, but stated that on September 5, after about one and a half hours general conversation about farming and life in general (never about whiskey), he first gave Billy Sanders (Sams) directions, upon inquiry, as to how to reach Durwood Norris' home, and that Sanders left to go there. He stated that Sanders came back between sundown and dusk and asked him to ride with him, and point the way to Norris' place, and that he

obliged. He had no knowledge that whiskey was involved until he saw it, he refused money for it, and took no part in moving the whiskey on the first occasion. He testified to two other occasions when he refused to accompany Sanders to Norris' home: once on September 21, and once a week earlier, despite Sanders' importunity on the ground of unfamiliarity with local country roads. He denied receiving the September 20 phone call from Sams as to the 200 gallons being ready, and further denied any conversation about whiskey with Sams when Sams came to his home September 21.

II. *The Grounds of Error Asserted*

The first ground of claimed error is that Harrell was entitled to, and was denied, an affirmative charge that entrapment had been established as a matter of law and that he should accordingly be acquitted. The court submitted the defense of entrapment to the jury after some hesitation because of the government's position as to the implications inherent in Harrell's denials of commission of the offenses charged. We think this course was proper despite appellee's contention to the contrary, under the teachings of *Sears v. United States*, 5 Cir. 1965, 343 F.2d 139, where we inquired into "whether the defense of entrapment is an unavailable defense to one who, as Sears does here, denies the commission of the acts charged". We there held that where a defendant does not have to take an inconsistent position, he is not precluded from invoking entrapment as a defense. Harrell did not have to take an inconsistent position and could properly assert, as we said the defendant did in *Henderson v. United States*, 5 Cir. 1956, 237 F.2d 169, 173, that "I did not go so far as to become a party to the conspiracy, but to the extent that I did travel down the road to crime, I was entrapped".

We are of the view, however, that the question of entrapment in this case was properly for decision by the jury as a factual matter, not by the trial judge as a matter of law. *Goss v. United States,* 5 Cir. 1967, 376 F.2d 812; *Cline v. United States,* 8 Cir. 1920, 20 F.2d 494. As stated in *Goss,* supra: "The issue of entrapment is a question for the jury unless as a matter of law the defendant has established beyond a reasonable doubt that he was unlawfully entrapped". Here, it is apparent that the evidence was susceptible of more than one interpretation.

A related question arises because of the court's failure to instruct the jury as to the government's burden of proof beyond a reasonable doubt as to no entrapment, once the defendant has come forward with some evidence of inducement. Although apparently never specifically adopted by this Circuit, this is the accepted rule.[6] We would follow *Notaro,* and reverse for the trial court's error in this respect, if objection had been timely made to the charge, as required by Rule 30, F.R.Crim.P. See also *Kivette v. United States,* 5 Cir. 1956, 230 F.2d 749, cert. denied 355 U.S. 935, 78 S.Ct. 419, 2 L.Ed.2d 419; *United States v. Sherman,* 2 Cir. 1952, 200 F.2d 880, 882, 883. But the dereliction was not brought to the trial court's attention, and since the case must be reversed on other grounds, we pretermit discussion of whether "plain error" is thus presented, under Rule 52(a), F.R.Crim.P. Of course, upon retrial the trial judge should follow *Notaro* standards in his jury instructions if entrapment is again offered as a defense.

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[6] See *Notaro v. United States,* 9 Cir. 1966, 363 F.2d 169, where there are set forth the procedural guidelines to be followed once the entrapment issue is raised, and also the following cases: *Sagansky v. United States,* 1 Cir. 1966, 358 F.2d 195; *Johnson v. United States,* D.C. Cir. 1963, 317 F.2d 127; *United States v. Landry,* 7 Cir. 1958, 257 F.2d 425; *Lunsford v. United States,* 10 Cir. 1952, 200 F.2d 237.

Error is asserted in permitting evidence to go to the jury regarding the finding of the distillery, with its component parts, fermenting mash and 35 additional gallons of "moonshine" immediately after Norris' arrest and within a few hundred yards of the "stash" of 200 gallons. The basis of this objection is that no charges against Harrell under any count of the indictment concerned this evidence. We think this still discovery was clearly a circumstance proper to be weighed by the jury in connection with the government's required burden of proof of the defendant's knowledge and intent under Count One, the charge of conspiracy. Relevant and closely connected circumstances may ordinarily be proved under charges of conspiracy, even though not the subject of overt acts or substantive counts.[7]

Likewise without merit is the claim that prejudicial error occurred when evidence was permitted to go to the jury regarding the prior "feud" between appellant and other law enforcement officials. This was probative of Harrell's pre-disposition to commit the offenses charged and went directly to sustaining the government's burden of proving no entrapment, albeit as a circumstance of no great probative weight. Furthermore, the fact that agents were snooping around his fields a month earlier was as likely to create sympathy for Harrell in the jury's eyes as otherwise, which is to say that we cannot find the admission of this testimony prejudicial, even if conceded to be of doubtful relevance.

We repudiate as insubstantial the further claim that error occurred when the prosecution was allowed to ask

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[7] See generally, as to the wide latitude to be allowed in admission of proof in conspiracy cases, the following: *Wangrow v. United States*, 8 Cir. 1968, 399 F.2d 106, 115, cert. denied 393 U.S. 933, 89 S.Ct. 292, 21 L.Ed.2d 270; *Nye & Nissen v. United States*, 9 Cir. 1948, 168 F.2d 846, affirmed 336 U.S. 613, 69 S.Ct. 766, 93 L.Ed. 919; *United States v. Von Clemm*, 2 Cir. 1943, 136 F.2d 968, cert. denied 320 U.S. 769, 64 S.Ct. 81, 88 L.Ed. 459.

questions as to Harrell's reputation for being in the whiskey business, both in cross of Harrell's reputation witnesses and of Agent Williams in rebuttal. This is so for two reasons: (1) because Harrell had himself put in issue his reputation for being a lawabiding citizen, and the questions asked went to meet the issue, and (2) because we cannot conceive of any harmful effect flowing to an admittedly convicted manufacturer of and dealer in unlawful whiskey from testimony as to his *reputation* for being in the whiskey business.

Having disposed of the questions raised which in our judgment do not rise to the level of reversible error, we turn now to two loosely related matters occurring at the trial which we think require reversal and retrial.

First, we are of the view that it was harmful error to admit, over objection, the post-arrest statement of Norris to Williams to the effect that he (Norris) owned the still, that it had been there three or four months, and that he put it there to help pay off the farm. This was prejudicial to Harrell's case.

It is established law, at least since *Krulewitch v. United States,* 1949, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790, and under so many cases prior to and following *Krulewitch* that it would be an affectation to cite them, that acts and declarations of co-conspirators are binding upon each member of the conspiracy, if made during the life of the conspiracy and in furtherance of any of its objects. There was of course ample evidence present from which the jury was entitled to infer that Norris and appellant were co-conspirators. Hence any statements made by Norris during and in furtherance of the conspiracy were admissible in Harrell's trial. Here is precisely the trouble. With his arrest, Norris' part in the conspiracy was over. Further and of decisive significance, admission of ownership of the distillery to a known government agent could not

possibly advance any object of the conspiracy. If Norris had been on trial, this admission if proved voluntary would have been admissible against him only; it could never be properly received in proof of Harrell's guilt.[8] *Scarborough v. United States*, 5 Cir. 1956, 232 F.2d 412. Cf. *Evans v. Dutton*, 5 Cir. 1968, 400 F.2d 826, probable jurisdiction noted 393 U.S. 1076, 89 S.Ct. 862, 21 L.Ed.2d 770; restored to calendar for reargument 397 U.S. 1060, 90 S.Ct. 1494, 25 L.Ed.2d 682.

We hold further, despite the fact that it came in without objection, that permitting the jury to hear proof as to Norris' pre-trial plea of guilty, particularly without proper limiting instruction, was, as to both the conspiracy count and the substantive counts, error of such proportions as

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[8] The following quotation from the trial court's general charge, while not itself objected to, graphically shows the manner in which the erroneous admission of Norris' post-arrest statement was emphasized to the jury:

> "Now, if and when it appears from the evidence in the case that a conspiracy existed, if it does in this case, and that Eafie Harrell was one of the members, then the acts thereafter knowingly done and the statements thereafter knowingly made by any person likewise found to be a member of the conspiracy may be considered by you jurors as evidence in the case as to each member of the conspiracy, including the defendant, if you find that a conspiracy existed and that he willfully and knowingly became a member of it. *That is the reason that the Court admitted for your consideration evidence as to what Norris did and as to what Norris said outside the presence of the defendant, so that you might have that evidence in the event it became appropriate for you to give consideration to it.* Ordinarily, any admission or incriminatory statement made outside of court by one person may not be considered as evidence against any person who was not present and heard the statements made, but this is an exception to that rule" (Emphasis added).

The instruction fails to limit consideration of the declarations of a co-conspirator to those made in furtherance of the conspiracy and during its existence. It then focuses directly upon the acts and *declarations* of Norris in the language emphasized by our italics. This was the equivalent of saying to the jury: "The court directs you to look to statements of Norris for proof of Harrell's guilt".

to require reversal. We are slightly more certain of our ground as to the conspiracy count, but analysis of the jurisprudence leads us to conclude that "plain error" occurred as to the substantive counts also. Rule 52(b), F.R. Crim.P. It clarifies our reasoning to deal with the effect as to conspiracy and substantive counts separately.

Our discussion of the prejudicial effect of permitting testimony as to Norris' prior pleas of guilty should be clearly understood as limited to the facts before us. We are not here at all concerned with the case where proof of a co-defendant's guilty plea is offered for a recognized evidentiary purpose,[9] and an appropriate accompanying instruction is given limiting the jury's consideration of the guilty plea to the evidentiary purpose for which the evidence as to it was received. No purpose was stated, none was required by the trial court to be stated, when the question of Norris' prior guilty pleas was introduced. The legitimate presumption is that the evidentiary purpose was the general one of demonstrating Harrell's guilt of the offenses for which he was on trial.

As to the first count, we have already noted that Norris and his counsel repeatedly pointed out that he was pleading guilty to conspiring with the "distilling fellows", not with Harrell. But this attempt to limit the nature of the plea, or more properly the nature of the admissions implicit in it, was never called to the jurors' attention during the trial. The impression was left that somehow the plea of guilty was inconsistent with Norris' testimony at trial: that proof of the plea of guilty was in the nature of impeachment of Norris' trial testimony, or worse yet, that it somehow proved Harrell's guilt. No limiting instruction was given when the evidence as to the guilty plea was received. The only remotely cautionary state-

[9] For instance, as impeachment of trial testimony, or as affecting credibility as a witness because of previous felony conviction.

ment during the court's general jury instructions was during the opening sentences of his charge:

> "The indictment in this case was returned February 6 of this year. It charges Durwood D. Norris and Rufus Eafie Harrell jointly in four separate charges. The guilt or innocence of Rufus Eafie Harrell must be determined separately from that of Durwood D. Norris. You are not concerned in this case, to the extent that it will be necessary for you to make a finding of guilt or innocence, with Durwood Norris. Of course, you are concerned with his participation in this case and the matters concerning which he and the other witnesses testified as to the part he played in it—but it will not be necessary for you to make any finding on the guilt or innocence of Norris. It will be necessary for you to find guilt or innocence of Rufus Eafie Harrell separately on each of the four charges in the indictment".

That was all. Nothing was said to dispel the predictably certain reasoning a juror could be expected to indulge in: If Norris, *as admitted,* was guilty of conspiring with Harrell, how then could Harrell be other than guilty of conspiring with Norris? Jurors equally with others are aware that "it takes two to tango".

With respect to Harrell's guilt or innocence, Norris' plea of guilty was no more and no less than an inadmissible hearsay statement—made long after the conspiracy had ended—that he and Harrell had indeed conspired together as the indictment charged. Despite the failure of trial counsel (not the counsel representing Harrell on this appeal) to object, we are firm in the view that "plain error" occurred as to Count One.[10] Over and beyond

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[10] See 4 A.L.R. 3d, page 709, as to the harmful and prejudicial effect, as to one alleged conspirator, of the receipt in evidence of proof of the guilty plea of a co-conspirator. Accord, see *Trussell*

the considerations usually present, Norris' unavailing and repeated attempts to make clear to the trial court that his guilty plea was not intended to implicate Harrell in any way, we think were aggravating circumstances that should at the very least have impelled clear warnings from trial court to jury as to the effect to be given Norris' plea.

Regarding the claimed harmful effect upon Harrell's right to a fair trial engendered by proof of Norris' guilty plea to Counts Two, Three and Four, the substantive counts, while the reasons for our decision are perhaps less compelling than the grounds for our holding as to Count

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v. United States, 6 Cir. 1960, 278 F.2d 478; *United States v. Hall*, 2 Cir. 1950, 178 F.2d 853; *United States v. Toner*, 3 Cir. 1949, 173 F.2d 140. Our research as to Fifth Circuit cases yields no clear answer as to the effect of receiving guilty pleas of co-conspirators. In *Babb v. United States*, 5 Cir. 1955, 218 F.2d 538, we reversed a conviction where a co-defendant (and described in the opinion as an "alleged co-conspirator") was permitted to testify, *over objection*, that he had pled guilty to all five counts of the indictment, citing *LeRoy v. Government of the Canal Zone*, 5 Cir. 1936, 81 F.2d 914 (discussed infra), stating:

> "Appellant's co-defendant and alleged co-conspirator, Broussard, a witness for the Government, was permitted to testify over objection that he had plead guilty to all of the counts of the indictment. This was error. This court held in Leroy v. Government of Canal Zone, 5 Cir., 81 F.2d 914, that it was error to admit judgments of conviction of two other defendants not on trial. We see no difference between admitting a judgment of conviction and permitting a co-defendant to testify to the same thing. Practically all the decisions now hold that it is error for the court to instruct the jury that they may consider the fact that co-defendants have plead guilty.
>
> "Appellant not only objected to Broussard's testimony as to his plea of guilty but requested the court to instruct the jury that they should not consider that fact for any purpose as bearing upon his guilt. We think this charge should have been given. A defendant is entitled to have the question of his guilt determined upon the evidence against him, not on whether a Government witness or co-defendant has plead guilty to the same charge" (Footnotes omitted).

Our difficulty with *Babb* is that although Broussard is stated to be an "alleged co-conspirator" the quotation of what is said to be

One, we believe that prejudicial error occurred in this respect as to these counts also.[11]

It suffices to start our discussion of this Circuit's decisions with *LeRoy v. Government of the Canal Zone,* 5 Cir. 1936, 81 F.2d 914, which of course predated Criminal Rule 52(b)'s "plain error" command.[12] There the point was preserved for appellate review by timely objection to receipt in evidence of proof of the conviction after not

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a count typical of all counts charges Babb, Broussard and a third person, Gilly, with a substantive offense, namely the willful and fraudulent transportation and concealment of Charolaise cattle with knowledge of their illegal importation, in violation of Title 18, U.S.C., Sec. 545.

We also note our case of *Elder v. United States,* 5 Cir. 1954, 211 F.2d 876. There we affirmed the conviction of Elder for conspiracy to violate the Dyer Act despite the fact (1) that an alleged co-conspirator, Austin, had pled guilty to the offense in the presence of the jury venire a day or so before Elder's trial began, (2) that this was verified by questions to Austin, over defense objection, during Austin's testimony as a government witness, and (3) government counsel commented on Austin's guilty plea during his jury summation. The refusal to reverse was based on the trial judge's cautionary instruction that the jury was not to consider Austin's plea of guilty as an indication of the guilt of the defendant on trial, Elder.

[11] Because our Circuit has spoken to the subject on several occasions, and in the interest of shortening this opinion, we pretermit discussion of the development by decisions of other circuits of the principles involved. Anyone interested in pursuing the subject should examine, for example, *Minker v. United States,* 3 Cir. 1936, 85 F.2d 425; *Nigro v. United States,* 8 Cir. 1941, 117 F.2d 624, 632, 133 A.L.R. 1128; *United States v. Hall,* 2 Cir. 1950, 178 F.2d 853; *Payton v. United States,* D.C. Cir. 1955, 222 F.2d 794, 796; *Trussell v. United States,* 6 Cir. 1960, 278 F.2d 478; *Koolish v. United States,* 8 Cir. 1965, 340 F.2d 513; *United States v. Kimbrew,* 6 Cir. 1967, 380 F.2d 538; *Freije v. United States,* 1 Cir. 1967, 386 F.2d 408, 411.

[12] Rules of Practice and Procedure, promulgated by the Supreme Court May 7, 1934, governed appellate procedure in federal criminal cases in 1936. Claims of error at trial were preserved for review by settling the Bill of Exceptions, under Rule IX of those Rules, in conformity with then Rule 8 of the Rules of the Supreme Court of the United States.

guilty pleas and trial of LeRoy's two co-defendants under a substantive charge of theft. Judge Richard W. Walker for this Court wrote succinctly and to the point:

> "Where two or more persons have been jointly charged with the same criminal offense, but one of them is separately tried after the others have been convicted, the judgment of conviction on that charge against the latter is not admissible in evidence against the one of those persons who is separately and subsequently tried on such charge. The previous conviction of others charged with the same criminal offense is not proof of appellant's guilt of that offense. People v. Kief, 126 N.Y. 661, 27 N.E. 556; State v. Bowker, 26 Or. 309, 38 P. 124; Campbell v. State, 133 Ala. 158, 32 So. 635; 16 C.J. 670. The judgment is reversed".

In *Babb v. United States* (supra, footnote 10), we reversed the conviction because the trial court permitted proof of a co-defendant's guilty plea over appellant's objection, and also refused a limiting instruction that the co-defendant's plea should not be considered as bearing upon appellant's conviction. *Babb* equated proof of a co-defendant's guilty plea with proof of a co-defendant's conviction after trial, *LeRoy v. Government of the Canal Zone,* supra.

In *Scarborough v. United States,* 5 Cir. 1956, 232 F.2d 412, (reversed for permitting an officer to testify in a conspiracy trial with a single defendant on trial to a co-defendant's post-arrest statement that he got all his whiskey from the appellant) we pointed out:

> "When appellant chose to exercise his constitutional right of pleading not guilty, after his fourteen co-defendants had entered pleas of guilty, only *the utmost care on the part of government counsel* and of

the court could assure him a fair and impartial trial". (Emphasis added) 232 F.2d at page 414.

Further in the same opinion we observed:

"It is now hornbook law that statements of alleged co-conspirators made outside the presence of the defendant are not admissible against him unless made during the progress of the conspiracy and in furtherance of its objects". 232 F.2d at page 415.

We interject that it is perhaps even clearer "hornbook" law that *unless the charge is conspiracy,* the statements of a co-defendant made outside the presence of the defendant on trial are *never* admissible. We emphasize our view that proof of Norris guilty plea, equally as to all four counts on trial, was hearsay as to Harrell.

The next case from this Circuit to be noted is *Bearden v. United States,* 5 Cir. 1963, 320 F.2d 99. Appellant's conviction for kidnapping (Title 18, U.S.C., Sec. 1201), transportation of a stolen aircraft in interstate commerce (Title 18 U.S.C., Sec. 2312), and for obstructing commerce (Title 18, U.S.C., Sec. 1951) was reversed on other grounds, but we made the following significant comment with respect to permitting a plea of guilty as a juvenile delinquent by the appellant's minor son to be entered in the jury's presence:

"There was no cautionary instruction not to consider this plea made to the jury by the district judge. As we said in Scarborough v. United States, 232 F.2d 412, 414 (5th Cir. 1956):

'When appellant chose to exercise his constitutional right of pleading not guilty, after his fourteen co-defendants had entered pleas of guilty, only the utmost care and caution on the part of Government counsel and of the court could assure him a fair and impartial trial.'

See also Babb v. United States, 218 F.2d 538 (5th Cir. 1955).

> *No motion was made on behalf of the appellant in connection with this phase of the trial. If we were not reversing the life sentence under count one we might consider the failure of the court to caution the jury as plain error denying appellant substantial justice.* However, in view of the failure of counsel to raise the point and in view of the fact that the evidence of appellant's guilt under count six is overwhelming, we think we should disregard this failure of the court as not 'affecting substantial rights' Fed.R.Crim.P. 52(a)." (Emphasis added)

We turn finally to this Court's decision in *United States v. Baete,* 5 Cir. 1969, 414 F.2d 782. Lindsey, Baete's co-defendant in that Dyer Act prosecution testified, without objection and without request for a limiting instruction that he (Lindsey) had earlier pled guilty to the charges. We were urged by appellant, relying upon *Babb v. United States,* supra, to hold that plain error had occurred. Despite the lack of objection and the lack of request for a limiting instruction the trial court in *Baete sua sponte* charged the jury not to consider Lindsey's guilty plea in determining the innocence or guilt of Baete.

We affirmed, distinguishing *Babb* in two respects: (1) the failure to object, and (2) the court's giving of a cautionary instruction. But we issued a stern caveat in these terms:

> "In cases where the jury has become aware of a co-defendant's guilty plea, we think the appellate court should carefully focus its attention on the sufficiency of the corrective instruction. The significance of remedial instructions in such circumstances is pointed out in Freije v. United States wherein the court observed:

> It is generally held that it is proper to receive the guilty plea of a codefendant, even in the presence of the jury, but this *presupposes* that cautionary instructions are given. (Emphasis added.)
>
> We recognize the fact that there may be aggravated circumstances in which the strongest corrective instruction would be insufficient, as, for example, where the guilty plea of one codefendant necessarily implicates another or others. However, in the absence of such circumstances, we think that a clear and strong cautionary instruction should be deemed sufficiently curative. In the instant case, the trial court's instruction was clearly sufficient." (Footnotes omitted.)

As we stated at the outset, the grounds for reversal are slightly less unclouded as to Counts Three, Four and Five than as to Count One, the conspiracy count. This is so *only because of the result reached in Baete.* But, because there are here present the "aggravating circumstances" alluded to in *Baete,* because of the failure of the trial judge to give any sort of cautionary instruction, and because of the strong dicta quoted *supra* from the *Bearden* court, we are constrained to the view that plain error was committed when proof of Norris' guilty plea to Counts Two, Three and Four, as well as to Count One, was allowed to go to the jury without any limiting instruction whatever.

Again, we decide only the case before us. But we think that the evidentiary purpose ordinarily to be served by proof of a co-defendant's plea of guilty is so shadowy, so insubstantial that it would be the better practice in run-of-the-mill cases to exclude such proof altogether.

The judgment of conviction below is reversed for further proceedings not inconsistent herewith.

Reversed

APPENDIX C

INSTRUCTIONS REQUESTED BY PETITIONER REGARDING ENTRAPMENT

12. The Court charges the jury that the defense of entrapment rests on the theory that the government may not be allowed to contend that a defendant is guilty of a crime where the government officials, agents, or employees were the instigators of his conduct.

13. The Court charges the jury that the defense of entrapment is available to a defendant where law enforcement officers or agents pursued tactics which offend common concepts of decency.

14. The Court charges the jury that if you are reasonably satisfied that the defendant, Rufus E. Harrell, has proved by substantial evidence that his action was induced by a government agent or representative, then the burden is on the United States to show that Rufus E. Harrell was not impermissibly entrapped. In order to meet this burden, the government must establish that it engaged in no conduct that was shocking or offensive per se and that the *defendant was not in fact corrupted by the inducement.*

16. The Court charges the jury that under the evidence in this case, the burden is on the United States to satisfy you beyond a reasonable doubt that the defendant, Rufus E. Harrell, was not entrapped into committing the acts alleged to have constituted the offenses complained of.

17. The Court charges the jury that if a person is not engaged in the violation of the law and is not presently thinking about or entertaining any notions about violating the law, and if an officer or government agent

comes along and originates the idea and implants the idea in that person's mind, and that person who theretofore had not thought about it, and was not thinking about violating the law at that time, yields to that suggestion and acts upon the idea implanted in his mind by the third person, then that would be entrapment, and a jury ought not convict in such a case.

18. The Court charges the jury that under the evidence in this case, the defendant has proved that he was induced to commit the offense charged herein. The Court further charges the jury that in light of such inducement, the government has the burden to prove beyond a reasonable doubt that (1) Harrell was ready and willing to commit the offense, and (2) that Harrell had the prior intent or purpose to commit the offense. The Court further charges that you should acquit the defendant Harrell if the government failed in this proof.